Supreme Court, U.S.
FILED

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No. 01-___

In The

Supreme Court of the United States

HURLEY HENSON,

Cross-Petitioner,

v.

SYNGENTA CROP PROTECTION, INC., ROBERT RABB, EDEE TEMPLET, and KENNETH A. DEVUN,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

HANY A. ZOHDY
Of Counsel
Suite J
12090 South Harrell's Ferry Road
Baton Rouge, Louisiana 70816
(225) 293-5300

Attorneys for Conditional Cross-Petitioner

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QUESTION PRESENTED FOR REVIEW

Can a federal court, using its inherent authority, sanction counsel without an express finding of bad faith conduct?

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hurley Henson, pursuant to S.Ct. R. 12.5, prays that this conditional Cross-Petition be granted to review the judgment of the Eleventh Circuit in the above-captioned case, in the event that this Court grants certiorari in *Syngenta Crop Protection, Inc. v. Henson*, Docket No. 01-757 (docketed Nov. 29, 2001). All Petition Appendix ("Pet. App.") references in this Conditional Cross-Petition are to the Petition filed in docket 01-757.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Henson v. Ciba-Geigy Corp.*, No. 99-6021 (11th Cir. Aug. 14 2001), is reported at 261 F.3d 1065, and is reprinted in the Petition for *Syngenta Crop Protection, Inc. v. Henson*, Docket No. 01-757 (docketed Nov. 29, 2001), at Pet. App. 1a. The U.S. District Court's Order of November 24, 1998, is unreported but is reprinted at id., Pet. App. 15a.

STATEMENT OF JURISDICTION

Conditional Cross-Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of August 14, 2001. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

STATEMENT

1. This Cross-Petition arise from two actions, both of which originally asserted various tort claims arising from Ciba-Geigy Corporation's (now Syngenta Crop Protection, Inc.) manufacture and sale of a chlorodimeform-based insecticide, Galecron. The first of the two actions, *Price v. Ciba-Geigy Corp.*, was originally filed in the circuit court of Mobile County, Alabama. The defendants later removed it to the Southern District of Alabama, which certified a nationwide class and approved a settlement. The second, *Henson v. Ciba- Geigy Corp.*, originated in state district court in Iberville Parish, Louisiana. Pet. App. 3a.

The Louisiana court stayed *Henson* after its named plaintiff and others successfully intervened in *Price* (where they were called the *Henson* interveners) and participated in the *Price* settlement. The settlement stipulation in the *Price* action had a clause requiring *Henson*'s dismissal. Id. Nonetheless, the reference to "CLAIMS defined herein" appeared to limit the scope of the settlement.

Following the approval of the *Price* settlement, "class counsel" (lawyers for the original *Price* plaintiffs) ostensibly complied with the stipulation and prompted the Louisiana state district court to enter an order to show cause why the action should not be dismissed because of the stipulation. A hearing before the Louisiana district court ensued. Hany Zohdy, a Louisiana lawyer who represented the *Henson* interveners in the *Price* proceedings, maintained before the Louisiana court that the *Price* settlement required dismissal only of claims concerning chlorodimeform and not claims about other chemicals handled by Ciba-Geigy. Zohdy's statement impelled the Louisiana court to invite the Henson plaintiffs to amend

their petition to assert tort claims arising from exposure to Atrazine, another toxic Ciba-Geigy product. Pet. App. 3a-4a.

2. This amendment prompted Ciba-Geigy (and three individual defendants, all diversity-defeating Louisiana residents, who were also named in *Henson*, to remove the action to the Middle District of Louisiana under 28 U.S.C. § 1441(a), asserting federal jurisdiction based on the All Writs Act, 28 U.S.C. § 1651(a). The defendants immediately requested a transfer to the Southern District of Alabama under 28 U.S.C. § 1404(a), which was granted.

Following the transfer, the Southern District dismissed *Henson* as barred by the *Price* settlement. Exercising jurisdiction in the *Price* action itself, moreover, the Southern District ordered Zohdy to pay about $27,000 to Ciba- Geigy for the legal fees it incurred in enforcing the *Price* settlement despite Zohdy's efforts to thwart it. Pet. App. 4a-5a. Nevertheless, the district court did not expressly find that Zohdy had acted in bad faith in challenging the scope of the *Price* settlement. See Pet. App. 16a (finding only that Zohdy had "attempted to thwart this Court's jurisdiction" and "had acted in a manner calculated to offend this Court and in complete defiance of the Court's Order.").

On appeal, the Eleventh Circuit ruled that the district court had the authority to sanction Zohdy, despite the fact that he was not class counsel in the *Price* proceeding, and was, therefore, admittedly under no direct duty to effectuate the settlement agreement. The court of appeals upheld the sanctions under a theory of the district court's inherent power "to effectuate its orders to punish Zohdy for interfering with the settlement's implementation." Pet. App. 6a (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991).

At the same time, the Eleventh Circuit rejected the

district court's use of the All Writs Act as a means of asserting removal jurisdiction over the *Henson* proceeding in state court. See Pet. App. 6a-12a. It is this aspect of the Eleventh Circuit's decision which is the subject of Syngenta's Petition, for which Henson has filed a Brief in Support.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

COURTS ARE DIVIDED ON WHETHER COUNSEL SANCTIONS CAN BE IMPOSED WITHOUT A FINDING OF BAD FAITH CONDUCT

This Conditional Cross-Petition invites the Court to revisit the extent to which federal courts have an inherent power to sanction counsel for violations of settlement agreements, even when an attorney is not directly obligated to effectuate such a settlement and there has been no express finding of attorney bad faith. This issue requires the Court to revisit its earlier decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), relied upon by the Eleventh Circuit below. See Pet. App. 6a.

Other courts of appeals have recognized that there is substantial dissonance between *Chambers* and other rulings of this Court, limiting the inherent powers of federal courts to sanction bad-faith conduct of counsel. As the Fifth Circuit has observed:

> We recognize that there may be some tension between *Chambers* and *Alyeska Pipeline* [41 U.S. 240 (1975)] regarding the ability of a court to exercise its equitable powers to assess attorney's fees for bad faith conduct in the face of a statute describing the circumstances in which fees may be assessed. See *Chambers*, 501 U.S. at 61 (Kennedy,

> J. dissenting) (noting the case "permits the exercise of inherent sanctioning powers without prior recourse to controlling rules and statutes, thereby abrogating to federal courts the power to regulate fees and costs").

Boland Marine & Mfg Co. v. Rihner, 41 F.3d 997, 1004 (5th Cir. 1995).

This confusion among lower courts has extended to the standard which they should apply in imposing sanctions against counsel under their inherent powers. As this Court noted in *Chambers*, a court should invoke its inherent power to award attorney's fees only when it finds that "fraud has been practiced upon it, or that the very temple of justice has been defiled." 501 U.S. at 46. Relevant here also is whether *Chambers* requires an express finding of bad faith conduct by counsel before an imposition of attorneys' fees is made. No such finding was made by the district court, se Pet. App. 16a, and the Circuits are divided as to whether such a finding is mandated by *Chambers* and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1979). See, e.g., *Harlan v. Lewis*, 982 F.2d 1255, 1259 (8th Cir. 1993).

Since Zohdy was not under an express duty with the *Price* settlement, as class counsel, to effectuate the settlement, and, indeed, may have been under an obligation to his clients in the *Henson* proceeding to test the limits of the settlement, it is doubtful whether a finding of bad faith could ever properly be made in this case. In any event, given that this Court has ruled that decisions to sanction counsel under the court's inherent powers are reviewed under an abuse of discretion standard, see *Chambers*, 501 U.S. at 55, it becomes all the more important for this Court to clarify the relevant standard for the imposition of such penalties.

CONCLUSION

The Conditional Cross-Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

HANY A. ZOHDY
Of Counsel
Suite J
12090 South Harrell's Ferry Road
Baton Rouge, Louisiana 70816
(225) 293-5300

Attorneys for Respondent

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